IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SECOND APPEAL NO. 7 OF 2006
With
CIVIL APPLICATION NO. 384 OF 2006
In SECOND APPEAL NO. 7 OF 2006

For Approval and Signature:

HONOURABLE MR.JUSTICE R.S.GARG

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the Civil Judge?

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GOVANBHAI BIJIYABHAI PATEL - Appellant(s)
Versus
SUMITRABEN DHANSUKHBHAI PATEL - Respondent(s)

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Appearance :
MR. DAKSHESH MEHTA for Appellant(s).
MR. P.P. MAJMUDAR & MR. S.P. MAJMUDAR for Respondent(2).

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CORAM : HONOURABLE MR.JUSTICE R.S.GARG

Date : 13/10/2006

ORAL JUDGMENT

Heard Mr.Dakshesh Mehta, learned Counsel for the appellant, and Mr.S.P.Majmudar with Mr.P.P.Majmudar,

learned Counsel for the respondents.

2. The appeal is admitted for hearing the parties on the following substantial questions of law:

(i) *Whether on the facts and in the circumstances of the case, the learned first Appellate Court was required to remand the case to the trial Court after setting aside the findings regarding non-maintainability of the suit for its decision on merits and in accordance with law?*

(ii) *If the answer to Question No.1 is in the negative, then, whether the learned first Appellate Court, which was taking up the factual issues for the first time, was required to consider the details of the evidence, marshal the same and record its findings independent of the findings which could be recorded by the trial Court?*

With the consent of the parties, the matter is finally heard.

3. The short facts necessary for disposal of the

present matter are that the respondent-plaintiff, Smt. Sumitraben, filed Regular Civil Suit No.32 of 1998 in the Court of the learned Civil Judge (J.D), Gandevi, which was finally disposed of on 18th July, 2002, wherein she had prayed for a declaration that she being an owner of the property, a declaration be granted in her favour that the defendant is not entitled to use the land belonging to the plaintiff as a thoroughfare and an injunction restraining the defendant from using the land under his alleged right of way.

3.1 The defendant appeared before the trial Court and submitted that he was exercising the right of way for long many years, he had perfected his right by prescription and under the circumstances, neither a declaration in favour of the plaintiff nor an injunction against the interest of the defendant could be issued. He also submitted that the suit at the instance of the plaintiff, who appears to be a joint owner, would not be maintainable unless the other joint owners/co-owners were joined as party plaintiffs or party defendants.

3.2 It appears from the arguments of the parties that at the initial stage, the plaintiff had made an application seeking interim injunction against the defendant, which was granted by the trial Court and the

same was maintained by the Appellate Court.

3.3 After recording the evidence on merits and hearing the parties, the learned trial Court decided Issue No.1 only and held that the suit is not maintainable. It, however, observed that Issue No.2(B) was not required to be decided. The suit was held to be not maintainable.

3.4 Being aggrieved by the said judgement and decree, the plaintiff preferred Regular Civil Appeal No.49 of 2002; it was finally heard and decided by the learned 2nd Fast Track Court, Navsari under its judgement dated 19th September, 2005. The Appellate Court held that the suit was maintainable. It also held that the plaintiff was entitled to a declaration and an injunction against the interest of the defendant.

3.5 Being aggrieved by the said judgement and decree, the defendant is before this Court.

4. Shri Mehta, learned Counsel for the appellant, submitted that if the learned first Appellate Court was of the opinion that Issue No.2(B) was required to be decided, then, it was obliged to remand the case to the learned trial court under Rule-23 of Order-XLI of the

Code of Civil Procedure because the trial Court did not decide the matter on any other issue except on the question of maintainability. He also submits that if under Rule-24 of Order-XLI, the Court could proceed to decide the matter on merits, then, it should have appreciated the evidence in its true perspective, compared reliability of the evidence of the parties and only then, it could record a finding of fact. He submits that the learned first Appellate Court failed in its duty either in observing Rule-23 or Rule-24 of Order-XLI, therefore, the appeal deserves to be allowed.

5. Mr. Majmudar, learned Counsel for the respondent, on the other hand, submits that Issue No.2(B) though was not decided by the learned trial Court, but, the learned Appellate Court had jurisdiction to take up the issue and decide the same under Rule-24 in view of availability of the evidence on records. He, however, submits that the findings recorded by the learned first Appellate Court are in accordance with law and under the circumstances, the appeal deserves to be rejected.

6. Issue No.2(B) framed by the trial Court reads as: `whether the defendant proves that he was exercising the right of way on the plaintiff's property, as contained in Exh.20 and paragraph-19 of the written

statement.”

In paragraph 17, the learned trial Court clearly observed that it was not deciding Issue No.2(B).

7. In an appeal, when an Appellate Court finds that the trial Court had disposed of the suit on a preliminary issue or on the question of law, then, ordinarily, it is required to remand the matter to the trial Court for decision on each and every issue in accordance with law after taking into consideration the totality of the circumstances and the evidence available on the records. Rule-24 does authorise the Appellate Court that in case it finds that the evidence to decide the issue is available on the records, then, instead of remanding the matter to the trial Court, it can always proceed to decide the matter in accordance with law. Undisputedly, in a case where the evidence is available on the records, then, the Appellate Court can exercise the powers vested in it under Rule-24 of Order-XLI, but, that does not mean that the Appellate Court has to cursorily examine the evidence or has to record casual findings. As an Appellate Court, which confirms the findings of the trial Court, the duty is not as heavy as it is on the trial Court, nor it is so heavy as on an Appellate Court, which is reversing the findings. In a

case where the issue is not decided by the trial Court and the Appellate Court proposes to decide the issue for the first time, that too, on the availability of facts, then, the approach of the Appellate Court should be that of the trial Court. It is required to consider the evidence, documentary and oral both, and it also has to record the findings after comparing the submissions made by the parties and after appreciating the arguments submitted by the parties. In the present matter, the learned first Appellate Court, after deciding Issue No.1 in favour of the plaintiff, proceeded to consider the evidence for the other issue. The totality of the discussion is to be found in paragraph-30 of the first Appellate Court's judgement. A perusal of paragraph-30 simply would show that according to the Appellate Court, the written statement indicated that the defendant was passing through the land of plaintiff for last more than twenty years; the Court then observed that the fact is not proved.

8. I am unable to approve such a finding. When an issue is cast and the parties lead evidence in support of their pleadings, then, duty is always heavy upon the Court which is recording a finding of fact for the first time. A finding that one set of evidence cannot be preferred against another set of evidence would not be

sustainable in law unless reasons are given that why one set of evidence is preferred against another set of evidence. In the present matter, the findings recorded in paragraph-30 of the judgement of the learned first Appellate Court are shorn of reasons and in fact, are no findings in the eye of law.

8. The findings contained in paragraph-30 of the judgement of the learned first Appellate Court are set aside. As a second Appellate Court, it would not be proper on my part to enter into the factual dispute for the first time and record a finding of fact because that would adversely affect the rights of the parties to challenge the correctness of the findings of facts. At this stage, the learned Counsel for the parties submit that instead of remanding the matter back to the learned first Appellate Court, the matter be remanded back to the trial Court for recording findings on the issues, which were not decided by the trial Court. In my opinion, the submissions are justified. Those are, accordingly, accepted.

9. The findings recorded by the learned Appellate Court against Issue No.1 relating to the maintainability of the suit in favour of the plaintiff are maintained, but, the matter is remanded back to the trial Court for

deciding the matter afresh in accordance with law.

10. The judgement and decree passed by the learned trial Court has already been set aside, therefore, I need not set aside the same, but, I set aside the part of the decree granted by the Appellate Court for the purpose of remand.

It is also made clear that when the judgement delivered by a Court is set aside and matter stands restored, then, all interim orders would stand revived. The appeal to the extent indicated above is allowed. No costs. Let a decree be drawn accordingly.

11. In view of the final disposal of the appeal, no orders on Civil Application No.384 of 2006 are required. Notice is discharged.

[R.S.Garg, J.]

*kamlesh**